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Fluidigm Corporation and Fluidigm Canada Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FLUIDIGM CORPORATION, a Delaware
corporation; and FLUIDIGM CANADA INC.,
a foreign corporation,

Plaintiffs,

v.

IONPATH, INC., a Delaware corporation,

Defendant.

Case No. 3:19-cv-05639-WHA

**FLUIDIGM CORPORATION AND
FLUIDIGM CANADA, INC.'S MOTION
TO AMEND BRIEFING SCHEDULE ON
THEIR MOTION TO MODIFY
SCHEDULING ORDER AND FOR
LEAVE TO FILE THIRD AMENDED
COMPLAINT**

Pursuant to Civil Local Rule 6-3, Plaintiffs Fluidigm Corporation and Fluidigm Canada Inc. (collectively “Fluidigm”) respectfully submit this Motion to Amend Briefing Schedule (the “Motion”) as to Fluidigm’s Motion to Modify Scheduling Order and for Leave to File Third Amended Complaint (the “Underlying Motion”). This Motion is supported by the Declaration of K. Lee Marshall, attached hereto.

As detailed more fully in Plaintiffs’ Underlying Motion, Fluidigm seeks to amend its pleading to include breach of contract, unfair competition, and false advertising claims. Such amendment is necessary due to the discovery of material, new evidence first discovered by Fluidigm during its August 28, 2020 deposition of IONpath, Inc.’s (“IONpath”) employee Dr. Jason Ptacek.

That evidence establishes, *inter alia*, that IONpath breached the terms and conditions it agreed to as part of a contract with Fluidigm for reagents and antibodies it later used to provide services to third parties. The evidence also establishes that IONpath made material misrepresentations about its own, and Fluidigm’s, products.

After discovering the new evidence, Fluidigm moved promptly to seek leave to amend its complaint. IONpath opposes that proposed amendment.

Given upcoming deadlines related to the patent showdown process and discovery generally, good cause supports Fluidigm’s requested amended briefing schedule in order to prevent avoidable harm and complications if the Underlying Motion is not resolved promptly.

As discussed in the supporting Declaration of K. Lee Marshall, under the current scheduling orders (DEs 72 & 128), the parties’ opening showdown summary judgment briefs are due October 29, 2020 and non-expert discovery closes January 29, 2021. Although the showdown process is limited to certain issues, discovery continues to progress as to all claims during the showdown process. If Fluidigm’s Motion is not heard until October 15, 2020, and even assuming that an order follows promptly, Fluidigm will be forced to decide between (i) engaging in discovery, including deposing relevant witnesses such as IONpath’s Dr. Finn, in the intervening weeks in connection with its showdown claims – without knowing whether the

1 additional claims of its Proposed Complaint are in the case, or (ii) waiting to engage in such
 2 discovery, and depose such witnesses, until after an order issues, particularly as witnesses may be
 3 deposed only once. Further, by waiting, Fluidigm risks missing out on the opportunity to include
 4 potentially valuable testimony in its showdown papers while also compressing additional non-
 5 showdown discovery.

6 Good cause exists to shorten time on the Motion. Fluidigm's operative complaint
 7 (including the specific claims it is asserting against IONpath) establishes the metes and bounds of
 8 this litigation. The Underlying Motion asks the Court to decide whether Fluidigm is permitted to
 9 file a Third Amended Complaint to include claims based on newly-discovered evidence
 10 previously in the sole custody and control of IONpath. Should the Court grant the Motion, the
 11 Court's ruling would give the parties guidance as to the scope of the theories that need to be
 12 addressed both during current discovery and in future, post-showdown proceedings. Whatever
 13 the Court's ruling on the Underlying Motion, securing that ruling promptly will enable the parties
 14 to focus their discovery efforts and showdown summary judgment papers on the theories that are
 15 currently in the case. A ruling from the Court on this threshold issue will allow the parties to be
 16 better able to investigate key issues and ultimately present the Court with a focused, well-
 17 developed record on which to resolve those issues.

18 Therefore, Fluidigm seeks the following expedited briefing schedule:

- 19 • Fluidigm Motion: September 8, 2020
- 20 • IONpath Opposition: September 16, 2020 at 11:59 pm PDT
- 21 • Fluidigm Reply: September 21, 2020 at 11:59 pm PDT
- 22 • Hearing: At the Court's convenience

23 Expediting the briefing schedule as described will not alter the date of any other event or
 24 deadline already fixed by Court Order.

25 Fluidigm respectfully requests the Court grant its proposed briefing schedule for its
 26 Motion to Modify Scheduling Order and for Leave to File Third Amended Complaint.

1 Dated: September 8, 2020

Nick Williamson
BRYAN CAVE LEIGHTON PAISNER LLP

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4 By: /s/ Nick Williamson
Nick Williamson

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6 *Attorneys for Fluidigm Corporation*
7 *and Fluidigm Canada Inc.*
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